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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 450

MORRIS & COMPANY, et al.,
Petitioners,

vs.

SKANDINAVIA INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

JOHN M. LEE,
MARCELLUS GREEN,
GARNER WYNN GREEN,
CHALMERS POTTER,
SIDNEY MIZE,
Counsel for Petitioners.

BARNARD & MILLER PRINT, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Morris & Company, a Louisiana corporation (Garner W. Green and Chalmers Potter, sureties on its Writ of Error Bond, join herein), later called "Plaintiff," show:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

(Italics ours in all cases except when specially noted.)

Plaintiff sued defendant in Circuit Court, Harrison County, Mississippi, on a policy of insurance, issued in Buenos Aires, Argentine, covering a shipment on sailing ship Normandy from River Platte to Havana for $50,000.00 United States gold, totally lost May 23, 1919. (R., 4.)

Process was served on T. M. Henry, insurance commissioner (R., 10) appointed attorney in fact when defendant qualified in Mississippi March 27, 1923. (R., 141.)

Defendant, a Denmark corporation, sought removal therefrom to Federal Court, wherein it filed "pleas and motions" under an assumed special appearance, averring:

> "1. * * * the court is without jurisdiction of the person * * * defendant * * * (as) * * * plaintiff is a non-resident * * * the defendant is not a citizen of * * * Mississippi but a corporation * * * of Denmark; the contract * * * was made without * * * Mississippi and was to be performed wholly without the state * * * Defendant was not doing business in * * * Mississippi at the time this suit was brought * * *; wherefore defendant prays judgment of said attempted service of summons, that it be quashed for want of jurisdiction over the person of this defendant.
>
> "2. And for further plea and motion, this defendant still appearing specially and solely for the purpose of asserting its rights as in these pleas and motions set out, * * * says * * * the same ought to *abate* or be *stayed* * * * because * * * plaintiff heretofore * * * in the * * * District Court of the United States for the Southern District of New York * * *" impleaded defendant thereon.
>
> "Wherefore it prays judgment of the said writ and declaration and that the same may be quashed, or, if the court should be of opinion that the proper relief is not the quashing of the writ but a suspension of the proceeding, * * * that this Honorable Court will * * * order that this suit do stay and be suspended and respited until the said action so pending * * * in the District Court * * * of New York * * * should have been determined."

At the February term, 1927, the following occurred:

"By Mr. Pillans, of counsel for defendant:

"*I am in open court demanding* of the plaintiff to know if it be not a fact *that an action in* * * * New York *has not been since the filing of that plea in this cause dismissed* * * *.

"By Mr. Green:

"That is a fact." (R., 65.)

The court ordered that a demurrer then sought to be filed be not filed and plaintiff be directed to reply.

Plaintiff applied to file a further demurrer; whereupon:

> "This matter coming on to be heard on motion of the plaintiff to be allowed to file another demurrer to the plea of the defendant, * * * and the plaintiff having been directed by the court to reply to the pleas of the defendant, and it further appearing to the court that the suit filed in New York has been disposed of, it is ordered that the motion of the plaintiff to file a demurrer to said pleas be denied, *and upon motion of the defendant*, the plaintiff is hereby ordered to traverse, admit, or otherwise reply to the allegations contained in the *pleas and motion to quash of the defendant*.
>
> "* * * after the parties are at issue thereon, said motion and pleas to be consolidated * * *." (R., 68.)

Issue was taken, jury impaneled, and it appeared that the defendant did only a *re-insurance business* in Mississippi, which aggregated, however, more than $4,000,000.00 (although fully qualified) in one year; premiums aggregating more than $60,000.00. (R., 224.)

Defendant executed a power of attorney on March 27, 1923, thus:

> "Scandinavia Insurance Company, * * * *desiring to transact business in the State of Mississippi*, in conformity with *the laws thereof*, does hereby * * * appoint T. M. Henry, * * * lawful attorney * * * upon whom *all processes of law against said corporation in any action or legal proceeding may be served*, subject to and in accordance with *all the provisions* of the statutes and laws of the said State of Mississippi, and * * * does hereby *expressly agree that any and all lawful processes* against it which may be served upon said T. M. Henry, *shall be deemed valid personal service upon said company* and shall be of the same force and validity as *if served upon said company*; and this authority shall continue in force and irrevocable so long as any liability of the said company remains outstanding in the said State of Mississippi, *whether incurred before* or since the making and execution of this instrument." R., 141.)

The defendant further appointed a resident agent:

> "The persons named below are the authorized agents for the transaction of the business of fire and tornado re-insurance, for the Skandinavia Insurance Company * * * and you are hereby authorized to issue your certificate of authority to them for that period. All said agents are bona fide residents of the State of Mississippi.
>
> "*All such agents are hereby authorized to accept and acknowledge service of all process, whether mesne or final, in any action or proceedings against said company in any of the courts of the said State of Mississippi*, and it is further admitted and agreed that such service or process aforesaid shall be taken and held to be valid and sufficient in that belief, *the same as if served upon said company according to the laws and practice of said state, or of any other state;* and all claims or rights of error by reason of the manner of such service, is hereby expressly waived and relinquished." (R., 142.)

Defendant further showed compliance with Section 5073 Mississippi Code, providing:

> All foreign companies must make "a deposit * * * *in exclusive trust for the benefit and security of all the company's policy holders and creditors in the United States,* * * *"*

The District Court abated the suit because "no business was done in Mississippi" and, in virtue thereof, it held defendant was not suable, and held that while plea of *lis pendens* subordinated defendant's person to court's jurisdiction as a court, Section 523 Hemingway's Mississippi Code (1917), providing:

> "The defendant may plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ of declaration; * * *"

destroys this rule of federal jurisdiction.

This decision was affirmed in the Circuit Court of Appeals June 29, 1928.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. Defendant is subject to suit in Mississippi under a foreign insurance policy in a transitory action thereon, accruing May 23, 1919, because

(a) Defendant's contract of qualification in Mississippi, (post dating policy and liability thereon) on March 27, 1923, confers jurisdiction of *all causes of action;* local statutes and decisions being disregarded and the decisions of this court ignored by Court of Appeals.

(b) Qualification equivalent to domestication; and

(c) Even if doing business requisite, the voluntary selection by defendant of that portion of insurance business deemed most advantageous, namely, re-insurance, under a general qualification, was doing business sufficient to subordinate person to local jurisdiction.

2. Plaintiff, a Louisiana corporation, sued defendant, a Denmark corporation, in a Mississippi court having jurisdiction—neither party residing in Mississippi, whereupon defendant became an actor by removing suit from State Court to Federal Court, thereby, voluntarily, under the decisions of this court, defendant waived want of jurisdiction over its person.

3. Contrary to the decisions of this court and the rule in the Fourth Circuit (*Mankin* v. *Bartley*, C. C. A. 255 Fed. 926), while filing plea of former suit pending operated as entry of appearance subjecting defendant's person to federal jurisdiction, the courts below held Section 523 Mississippi Code operative to divest federal jurisdiction.

Wherefore, petitioner prays a writ of certiorari from this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and

to send to this court for its review and determination on a day certain therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5229, *Morris & Company, Plaintiff in Error*, v. *Skandinavia Insurance Company, defendant in Error*, and that said judgment of said court may be reversed and your petitioner have such other and further relief as to this Honorable Court seems meet and just. Therefor petitioner prays.

MORRIS & COMPANY,

By JOHN M. LEE,
MARCELLUS GREEN,
GARNER WYNN GREEN,
CHALMERS POTTER,
SIDNEY MIZE,
Counsel for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinions of the courts below.

The Opinion in the District Court appears, R., 184, and that in the Court of Appeals R., 204.

II.

Jurisdiction.

1.

The date of the judgment to be reviewed is June 29, 1928. (R., 207.)

2.

Petitioner advances these specific claims:

(a) When respondent qualified in Mississippi on March 27, 1923, (after loss on May 23, 1919), by (1) appointing Insurance Commissioner its agent for service of all process and (2) a local resident agent and (3) otherwise subordinating itself to the jurisdiction of Mississippi by writing reinsurance not permitted save to those doing business that (a) under the statutes of Mississippi, and (b) under the decisions of Mississippi, it was liable to suit in Mississippi on a foreign transitory cause of action antecedently arising where Mississippi had in behalf of such cause of action specifically required of respondent "a deposit * * * in exclusive trust for the benefit and security of all the company's policy holders and creditors in the United States * * *." Section 5073.

(b) After the plaintiff, a Louisiana corporation, sued defendant, a Denmark corporation, in a Mississippi Court, of general jurisdiction, neither party residing in Mississippi, when defendant removed to the local Federal District Court, thereby it became an actor and waived want of personal jurisdiction otherwise existing.

(c) By filing plea of former suit pending, personal appearance was entered; the courts below so declared, but erroneously held jurisdiction of the Federal Court over defendant's person was divested by Section 523, Mississippi Code contrary both to decisions (1) of this court and (2) of *Muskin* v. *Bartley*, (4th C. C. A.) 255 Fed. 466.

3.

Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. at L. 938, Section 347 U. S. Code Ann.

4.

Jurisdiction sustained by *Forsythe* v. *Hammond*, 166 U. S. 506, 41 L. ed. 1095, *Hamilton Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 60 L. ed. 629, in this, that

(a) Decisions of this court vouchsafing operation to qualification statutes and decisions conferring local jurisdiction thereover, entirely ignored;

(b) Decisions of this court defining effect of removal where both parties are non-resident, specifically ignored;

(c) Further decisions of this court declaring Federal jurisdiction independent of local State statutes ignored and a contrary rule is assumed to be established in the Fifth Circuit, from that prevailing in the Fourth Circuit where a statute similar held not operative to alter Federal jurisdiction.

III.

STATEMENT OF THE CASE.

Reference is respectfully made to "A Summary Statement of Matter Involved," *supra*, in the Petition for Certiorari.

IV.

SPECIFICATION OF ERROR.

SPECIFICATION No. 1.

1. The court erred in holding, in a suit for a loss occurring May 23, 1919 on sailing ship Normandy, that defendant, a foreign insurance corporation, who qualified in Mississippi March 27, 1923, and

(a) Who had specifically made a deposit under Sec. 5073, Hem. Code 1917,

> ... * * * of a sum not less than the capital required of like companies under this chapter * * * in exclusive trust for the benefit and security of *all the company's policy-holders and creditors in the United States*";

(b) who had executed on March 27, 1923, a power of attorney quoted *supra* to the Insurance Commissioner, as required by Section 5069, Hem. Code, 1917,

> "*Third.* It shall * * * constitute and appoint the Commissioner of Insurance * * * its true and lawful attorney, upon whom *all process* in any action or legal proceeding against it may be served, and therein shall agree that any process against it which may be served upon its said attorney shall be of the same force and validity as *if served on the Company;*"

and

(c) who had executed a power of attorney to a resident agent, quoted *supra*, as required by Section 4 thereof;

> "*Fourth.* It shall appoint as its agent in this State some resident or residents thereof other than the said Commissioner, signed by the president and secretary or manager or general agent, and filed in the office of the Commissioner, authorizing the agent to acknowledge service of process for and on behalf of the company, and consenting that service of process on the agent *shall be as valid as if served upon the company*, according to the laws of this State, and waiving all claim of error by reason of such service,"

was not subject to suit in Mississippi on an insurance policy, on which liability had accrued, issued beyond the confines of the State before qualification in Mississippi, under *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining & Milling Company*, 243 U. S. 93, 61 L. ed. 610, to a resident of Louisiana, a citizen of the United States,

When

(1) Section 5028 of said Code provides:

> "It shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest * * * in this State * * * or for

any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interest in this state, shall be deemed to be made therein," and

(2) Section 5119 provides:

"Foreign fire insurance companies legally authorized to do business in this State through regularly commissioned and licensed agents located in this State, shall not make contracts of fire insurance on property herein, save through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this State," and

(3) The Supreme Court of Mississippi had so held, in pursuance of common law without statute.

New Orleans J. & G. N. R. R. Co. v. *Wallace*, 50 Miss. 244; *Pullman Co.* v. *Laurence*, 74 Miss. 800; *Pool* v. *L. & N. R. R. Co.*, 72 Miss. 287; *N. O. G. N. R. R. Co.* v. *Fortenberry*, 107 Miss. 83; *Shreveport & Pacific R. R. Co.* v. *Forcheimer*, 74 So. 419; *Camden Fire Insurance Co.* v. *Delaney*, 116 So. 744 and then so held in virtue of statutes:

(a) Section 4088:

"Corporations which exist by * * * the laws of any foreign country, may sue in this State by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, *as individual non-resident debtors* may be proceeded against," and

(b) Section 4093:

"Any corporation claiming existence under the laws of * * * any other country foreign to the United States, found doing business in this State, shall be subject to suit here to the same extent that corporations of this State are, *whether the cause of action accrued in this State or not*."

These statutes have been judicially construed as the precise equivalent of the statute construed in the *Gold Issue case*.

Specification No. 2.

The court erred in that it assumed (R., 184) that though qualified to do business in Mississippi, and having executed the instruments recited under the statutes above recited, that the doing of business conditioned service of process on an accrued liability on a previously issued policy; and erred in not holding that by qualification and other acts delineated, *supra*, defendant *quoad* this suit, did not become a local corporation and estopped from claiming immunity.

Specification No. 3.

If Doing Business Conditions, and Qualification is not Domestication, yet Re-Insurance Done is the Doing of Business, *State* v. *Tomlinson*, 129 N. E. 684, under Section 5070, Hemingway's Code 1917, which provides:

> "Whenever an application for license, for renewal of license, or for admission to this State, is made by a company * * * for the transaction of business of fire insurance herein, such company shall, as one of the prerequisites of admission, file a sworn declaration * * *, that it will not reinsure any risk or part thereof taken by it on any property located in Mississippi with any company *not authorized to transact the business of fire insurance in this State* * * *. Reinsurance premiums paid to companies authorized to do business in Mississippi may be deducted from gross premiums in the semi-annual tax returns, when affidavits are furnished from such authorized reinsuring companies that the amounts so deducted are included in their own semi-annual tax returns, and are paid on by the authorized reinsuring company." and

Section 5071 provides:

> "Every fire insurance company now or hereafter admitted shall annually, * * * make a return to the Insurance Commissioner in such form and detail as may be prescribed by him of all reinsurance contracted for or affected by it directly or indirectly, upon property lo-

> cated in Mississippi, * * * and if any company, domestic or foreign, shall directly or indirectly reinsure any risk taken by it on any property located in Mississippi in any company not duly authorized to transact business herein, * * * or it shall refuse or neglect to make the return required by this section, the said commissioner shall revoke its authority to transact business in this State."

By Section 5028 quoted above all contracts are deemed to be made within Mississippi.

Specification No. 4.

Defendant entered a voluntary general appearance when it removed to the District Court this cause, where neither plaintiff nor defendant resided in Mississippi voluntarily waiving personal privilege otherwise existing. *Ex Parte Wisner*, 203 U. S. 449:

Re Moore, 209 U. S. 904, holds:

> " * * * The defendant applied for a removal of the case to the Federal Court. Thereby he is foreclosed from objecting to its jurisdiction." (*Not questioned on this.*)

Rose's Federal Jurisdiction and Procedure, (3rd ed.) 363; *Vaughn* v. *McArthur*, 227 Fed. 367; *Klink* v. *Chicago, R. I. P. Ry. Co.*, 219 Fed. 457 (C. C. A. 8th Cir.).

Specification No. 5.

The court erred in holding that Section 523 Hemingway's Code 1917, which provides:

> "*Several pleas in abatement.*—The defendant may plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ or declaration; and he shall set forth the matters in separate pleas, and in plain, intelligible concise language, without regard to technical form."

operative in District Court to divest Federal jurisdiction over the person, voluntarily conferred by filing plea of *lis pendens*.

BRIEF.

POINT I.

Defendant is subject to suit in Mississippi on a policy of insurance issued outside of Mississippi wherein a loss occurred May 23, 1919, when thereafter defendant qualified in Mississippi on March 27, 1928.

(a) DEFENDANT'S CONTRACT CONFERS JURISDICTION UPON THE COURT, IRRESPECTIVE OF THE DOING OF BUSINESS.

Section 5069, Hem. Code; Section 5028, Hem. Code; Section 5119, Hem. Code; Section 5144, Hem. Code; *Insur. Co. v. Hyde*, U. S. Adv. Shts., Jan. 16, 1928, p. 163; *Tyson v. Banton*, 71 L. Ed. 718, 271 U. S. 418; *Insur. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *Insur. Co. v. Yates*, 214 Ill. 272; *Philadelphia & Reading R. Co. v. McKibbin*, 243 U. S. 264; *Penn. Fire Insur. Co. v. Gold Issue, etc.*, 243 U. S. 93; *Robt. Mitchell Furn. Co. v. Constr. Co.*, 257 U. S. 213; *Blake v. McClung*, 172 U. S. 239; *Compania Gen. de Tobascos v. Collector, etc.*, 275 U. S. 87; *N. O. J. & G. N. R. R. Co. v. Wallace*, 50 Miss. 244; *Paul v. L. & N. R. R.*, 72 Miss. 287; *Pullman Co. v. Lawrence*, 74 Miss. 800; *Vicksburg, S. & P. R. R. v. Forcheimer*, 74 Sou. 419; *Fidelity, etc., Co. v. Cross*, 89 Sou. (Miss.) 780; *Contin. Cas. Co. v. Gilmer*, 111 Sou. (Miss.) 741; *Nat'l. Surety Co. v. Holmes County*, 120 Miss. 706; *Globe Rutgers Ins. Co. v. Sale*, 107 Miss. 169; Section 4088, Hem. Code; Section 4093, Hem. Code; *Penn. Fire Insur. Co.*, 267 Mo. 524, 184 S. W. 999; *State ex rel Grim*, 239 Mo. 135, 143 S. W. 432; *Marqueze et al. v. Caldwell*, 48 Miss.
23 91; *Johnson v. Trade Ins. Co.*, 132 Mass. 432; *Mooney v. Buford*, 72 Fed. 32; *Wilson v. Fire Alarm*, 149 Mass. 24,

20 N. E. 318; *Reynolds* v. *M. K. & T. Ry. Co.*, 117 N. E. (Mass.) 913; *Bagdon* v. *Philadelphia & Reading Coal, etc., Co.*, 217 N. Y. 432; *Smolik* v. *Philadelphia & Reading, etc., Co.*, 222 Fed. 148; *Bloom* v. *Iron Novelty Corp.*, 219 N. Y. S. 93; *State ex rel. Goldwyn, etc.*, v. *Gehrz*, 194 N. W. 418; *Reeves* v. *Sou. Ry. Co.*, 121 Ga. 561; *Lipe* v. *Railway Co.*, 116 S. E. 101; *Dragon Motor Car Co.* v. *Starrow*, 205 N. W. 694; *Rishmiller* v. *R. R. Co.*, 134 Minn. 262; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Clair* v. *Cox*, 106 U. S. 350; *Conn. Mut. Life, etc., Co.* v. *Spratley*, 172 U. S. 602; *Goldey* v. *The Morning News*, 156 U. S. 518; *Conley* v. *Alkali Works*, 190 U. S. 406; *Old Wayne Mut. Life Ins. Assn.* v. *McDonough*, 204 U. S. 8; *Peterson* v. *Chicago R. I. & P. R. R.*, 205 U. S. 389; *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573; *Comm. Mut. Accident Co.* v. *Davis*, 213 U. S. 245; *Riverside etc., Cotton Mills* v. *Menefee*, 237 U. S. 189; *Simon* v. *Southern R. Co.*, 236 U. S. 115; *Farmers & Merchants Bank* v. *Fed. Res.*, 286 Fed. 565; *Rosenberg Bros.* v. *Brown Co.*, 260 U. S. 517; *Lumiere* v. *Wilder*, 261 U. S. 174; *Lee* v. *Newman*, 55 Miss. 365; *Washington* v. *Soria*, 73 Miss. 665.

(b) DEFENDANT ESTOPPED FROM CLAIMING NO BUSINESS DONE BY EXECUTION OF CONTRACT AGREEING TO BE SUED.

Pennoyer v. *Neff*, 95 U. S. 714.

POINT II.

Defendant's acts a doing of business.

(a) QUALIFICATION IS EQUIVALENT, AS TO AN INSURANCE COMPANY, TO DOMESTICATION.

State ex rel. v. *Grimm*, 239 Mo. 135.

Cainey v. *United Surety Co.*, 217 N. Y. 273.

(b) REINSURANCE IS DOING BUSINESS.

Sections 5070-77, Hem. Code; Section 5028, Hem. Code; Section 5119, Hem. Code; Section 5144, Hem. Code; Section

5141, Hem. Code; *State ex rel. European Accident, etc., Co.* v. *Tomlinson*, 129 N. E. (Ohio) 684; Section 5014, Hem. Code; Section 5023, Hem. Code; *Fikes* v. *State*, 87 Miss. 251; *State* v. *Alley*, 86 Miss. 720; Section 5027, Hem. Code; *Allemania Fire Ins. Co.* v. *Firemens Ins. Co.*, 209 U. S. 632, 52 L. Ed. 845.

POINT III.

When defendant's qualification in Mississippi was for a complete transaction of business, its voluntary election to do only a certain portion does not confer immunity from suit.

Farmers & Merchants Bank v. *Fed. Res.*, 262 U. S. 659; *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *State* v. *Alley*, ~~81 So. 107~~ (Miss.); *Fikes* v. *State*, 87 Miss. 251.

16 Miss. 720

POINT IV.

Defendant entered voluntary appearance.

(a) AS PLAINTIFF SUED DEFENDANT IN MISSISSIPPI, WHERE NEITHER RESIDED, DEFENDANT BY REMOVAL WAIVED OBJECTION TO PERSONAL JURISDICTION.

Ex parte Wisner, 203 U. S. 449; *Ex parte Moore*, 209 U. S. 470; *U. S.* v. *Hesslob*, 237 U. S. 12; *Rose's Fed. Jurisdiction & Prac.* (3d Ed.) 383; *Vaughn* v. *McArthur Bros. Co.*, 227 Fed. 307; *Nuckels* v. *Pullman Co.*, 268 Fed. 614; *Klink* v. *Chicago R. I. P. Ry. Co.*, 219 Fed. 457; *Matarazzo* v. *Hustis*, 257 Fed. 894; *Cincinnati Ry. Co.* v. *Orr*, 215 Fed. 262; *Coalmont, etc., Coal Co.* v. *Matthews, etc.*, 271 Fed. 115; *Pollard* v. *Dwight*, 4 Cranch 421.

(b) PLEAS OF LIS PENDENS IN DISTRICT COURT BEING MADE, SECTION 523, HEM. CODE, 1917, IS INOPERATIVE TO OUST FEDERAL JURISDICTION WHICH IS NOT AFFECTED BY THE CONFORMITY STATUTE.

Mankin v. *Bartley*, 255 Fed. 466; *Munter* v. *Weil Faucette Co.*, 261 U. S. 276; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 438; *Western Loan & Savings Co.* v. *Butte, etc.*, 210 U. S. 368; *Big Vein Coal Co.* v. *Read*, 229 U. S. 38; *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127; *Jones* v. *Andrews*, 10 Wall. 327; *Chatters* v. *Louisville & N. R. Co.*, 17 Fed. (2d ed.) 306; *Cain* v. *Comm. Pub. Co.*, 232 U. S. 124; *Frackman* v. *Lloyds*, 7 Fed. (2d ed) 620; *De Lima* v. *Bidwell*, 182 U. S. 174.

ARGUMENT.

POINT I.

Defendant is subject to suit in Mississippi on a policy of insurance issued outside of Mississippi wherein a loss occurred May 23, 1919, when thereafter defendant qualified in Mississippi on March 27, 1923.

(a) DEFENDANT'S CONTRACT CONFERS JURISDICTION UPON THE COURT, IRRESPECTIVE OF THE DOING OF BUSINESS.

District Court directed a verdict because defendant "was not doing business in Mississippi." The Court of Appeals specifically affirmed.

In 1923 defendant was

> "desirous of *re-entering* the State of Mississippi *for the purpose of transacting a fire re-insurance business* under treaties with direct writing companies"

and on March 27, 1923, executed general powers of attorney quoted *supra*, pp. 3, 4, covering

> "*all processes* of law against said corporation *in any action*."

This corporation paid the license tax, exacted under Section 5074.

On March 6, 1917, two cases were decided, *Philadelphia & Reading R. Co.* v. *McKibbin*, 243 U. S. 264, by Justice Brandeis, and *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 61 L. ed. 610, herein called Gold Issue case. There the insurance company had executed a power of attorney under a statute the equivalent to that of Mississippi. The Mining Company, an Arizona corporation, brought an action in Missouri on a policy issued in Colorado on property therein. Missouri, just as

Mississippi, construed her statute (267 Missouri 524, 184 S. W. 999), and the Federal Supreme Court said:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant has executed a power of attorney *that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract.* If it had appointed an agent authorized *in terms to receive service in such cases, there would be equally little doubt.* * * * It did appoint an agent *in language that rationally might be held to go to that length.* The language *has been held to go to that length, and the construction did not deprive the defendant of* due process of law even *if it took the defendant by surprise, which we have no warrant to assert.* * * * Other state laws have been construed in a similar way; *e. g., Bagdon* v. *Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, L. R. A. 1916F 407, 111 N. E. 1075; *Johnston* v. *Trade Ins. Co.*, 132 Mass. 432.
>
> But *when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act. The Eliza Lines*, 199 U. S. 119, 130, 131, 50 L. Ed. 115, 120, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406."

On the same day, Mr. Justice Brandeis, in the McKibben case, declares:

> "A foreign corporation *is amenable to process* to enforce a personal liability, *in the absence of consent* only as to doing business within the state, in such a manner and to such an extent as to warrant the inference that it is present there."

So, under the Constitution, we have two separate cases, service (a) by consent [the case here], (b) by the doing of business.

The *McKibben case* deals specifically with all of the decisions which could be relied on *contra*. These two decisions covered the one, *consent*, the other, the implication

from business done, without qualification. Since that date the decisions as to doing of business, as embodied in the *McKibbin case*, have never questioned the "consent" decision, and were approved in *Hess* v. *Pawloski*, 274 U. S. 352; 71 L. Ed. 866; *Wucher* v. *Pizzutti*, 48 Sup. Ct. Reporter 259, dissenting opinion in *Power Co.* v. *Saunders*, 274 U. S. 498, 71 L. Ed. 1170.

In *Robt. Mitchell Furniture Co.* v. *Construction Co.*, 257 U. S. 213, 66 L. Ed. 201, Mr. Justice Holmes, who delivered the opinion in the *Gold Issue case*, said:

> "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state. Of course when a foreign corporation *appoints one*, as required by statute, *it takes the risk of the construction that will be put upon the statute* and the *scope of the agency by the state court*. *Pennsylvania F. Ins. Co.* v. *Gold Issue Min. & Mill. Co.*, 243 U. S. 93, 61 L. Ed. 610, 37 Sup. Ct. Rep. 344. • • • *Unless the state law, either expressly or by local construction, gives* to the appointment *a larger scope*, we should not *construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere*, at least, if begun, *as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence*. *Shipment* v. *Thomas B. Jeffrey Co.*, *supra*. The indications of the Ohio Statutes, so far as they go, look to 'Liability incurred within this state.' Gen. Code, Sec. 181. As *we know of no decision to the contrary* by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad." See also, *Railroad Co.* v. *Oar Co.*, 257 U. S. 533; 66 L. Ed. 354."

To qualify as a foreign corporation in Mississippi, defendant made a special deposit "in exclusive trust" for this plaintiff, conferring the rights set out in *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432.

People v. *Assn.*, 55 N. E. (N. Y., 1899) 1054.

Defendant specifically contracted that the process served upon Henry should be effectual:

(a) "T. M. Henry, insurance commissioner," was "its true and lawful attorney * * * upon whom *all process of law against* said corporation *in any action* may be served, subject to and in accordance with the provisions of the *statutes and laws of the State of Mississippi.* * * * And shall be deemed *valid personal service* upon said company, and shall be of the same *force and validity as if served upon said company.*"

And further, did agree as to said Wilkerson likewise.

The defendant applied, voluntarily, to be admitted into Mississippi, and declared:

"We shall immediately execute same and return to you, and hope that pending filing of this statement you will issue our license *to do business in your state.*" (R., 145.)

In virtue of this license it must be presumed that the company was doing business, if that is esential. *Compania Gen. de Tobacos* v. *Collector of Int. Revenue*, 275 U. S. 87.

Under powers of attorney, the defendant having made this deposit in exclusive trust was liable on any transitory cause of action in any court in the State of Mississippi of general jurisdiction both (1) by decision and, (2) express statute.

1. *Decisions.*

(a) In *N. O. J. & G. N. R. R. Co.* v. *Wallace*, 50 Miss. 244, it is said:

"*But they are liable to be sued like natural persons in transitory actions, arising ex contractu* or *ex delicto*, in any state, where *legal services of process can be had.* And upon a thorough examination of the law upon this subject, we have not been able to find much ground to doubt whether a private corporation of another state could be held to *answer to an action in our courts.* We can see no very good reason why artificial

persons should not be liable to suit in the courts of another state, as well as natural persons."

(b) See also, *Pool* v. *L. & N. Railroad*, 72 Miss. 287; *N. O. G. N. R. R.* v. *Fortenberry*, 107 Miss. 83.

(c) In *Pullman Co* v. *Laurence*, 74 Miss. 880, it was said:

"Independently of all adjudications on this subject, however, jurisdiction of the present case was properly taken by the court below under a positive statute of this state. Code of 1892, Section 849 (which is found in our former codes of 1880, 1871 and 1857, though not called to the attention of this court by counsel in any of our former cases in which this question was considered), is in these words, viz.:

'849. *Of foreign corporations.*—Corporations which exist by the laws of any other state of the Union, by the acts of congress, or the laws of any foreign state, may sue in this state by their corporate names, and they SHALL ALSO BE LIABLE TO BE SUED, *or proceeded against, by attachment*, or OTHERWISE, as INDIVIDUAL NON-RESIDENT DEBTORS MAY BE SUED *or proceeded against,' etc.*

By this statute, our courts are *thrown wide open to foreign corporations*, and they are made liable *to suit just as individual non-residents are*. They may be proceeded against by attachment, in proper cases, just as individual non-residents are liable to be proceeded against, or, *if legal process can be served on them in this state, they may be sued in any other appropriate form of action, just as individual non-residents who may come into this state and be legally served with process and may be sued in any appropriate action. The statute is so brief, plain and simple that it bears its meaning on its face and carries its own interpretation in its own language. We are of the opinion that the demurrer to the plea to the jurisdiction was properly sustained.*"

(d) Again, in *Vicksburg, Shreveport & Pacific R. R. Co.* v. *Parcheimer*, 74 Sou. 419, where it was said:

"Chapter 123, Laws 1908, is as follows:

'Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, *whether the cause of action accrued in this state or not*,' etc.

If we should look alone to our statutes and the decisions of this court, this case would be affirmed without a written opinion. See *New Orleans, etc., R. Co.* v. *Wallace*, 50 Miss. 244; *Pullman Palace Car Co.* v. *Lawrence*, 74 Miss. 782, 22 South 53. * * *

The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

(c) In *Fidelity, etc., Co.* v. *Cross*, 89 So. Miss. 780, the court said:

"In the present case the company filed the appointment of the insurance commissioner as its attorney in fact, as required by this section, and for the purpose of suit the commissioner is, under the terms of the statute, the *alter ego* of the company."

Southern Ins. Co. v. *Gormillian*, 110 So. (Miss.) 770.

Delta Ins. Co. & Realty Co. v. *Fourth National Bank*, 111 So. (Miss.) 435.

See also *Camden Fire Ins. Co.* v. *Delaney*, 116 So. (Miss.) 743.

2. STATUTES.

(a) By Section 4088, Hem. Code, it is expressly provided as set out in Pullman case, *supra*.

The admeasurements hereunder of liability to suit are that of "individual non-resident debtors." When such an individual non-resident debtor is served with process, he may be sued in any form of action in Mississippi.

(b) Not content with one statute, there is another—Section 4093, Hem. Code, set out in Forcheimer case, *supra*.

Thus, express declaration is contained: "Whether the cause of action *accrued in this state or not.*"

Of these statutes our court said, 74 So. (Miss.) 420:

> "It does not appear that either the Pennsylvania or the Louisiana statute involved in these two cases, respectively, expressly authorize a suit against a foreign corporation on a cause of action which did not accrue within the state enacting the statute in question. *Our statute in this regard is much more comprehensive, and expressly authorizes suit here, 'whether the cause of action accrued in this state or not.'*"

The contract signed by respondent covered liabilities "whether incurred before or since the making and execution of this instrument." On May 19, 1919, defendant became liable to plaintiff on a personal obligation for $50,000 United States gold, and being so liable, on the 27th day of March, 1923, executed the appointment quoted.

Respondent could not do business in Mississippi before the date of this instrument, yet respondent contracted for suit to be brought, covering not only subsequent obligations but obligations incurred before qualification, necessarily implying thereby a subordination to service in Mississippi for this cause of action. The contract entered into with respect to Mississippi's jurisdiction subordinated respondent as to precedent liabilities, necessarily extraterritorial, and were by this contract specifically assumed. Opposite counsel recognized this when, on page 63 in Court of Appeals, of his brief he said:

> "It may be that the broad language of the Mississippi statutes, and particularly Section 4586 of Hemingway's Miss. Code of 1927 (Sec. 4093 of Hemingway's Miss. Code of 1917), and THE JUDICIAL CONSTRUCTIONS THEREOF, are sufficient to enable the maintaining of an action in Mississippi, on a cause of action arising without the state, by service on an agent for service, when the defendant is 'found doing business' within the state; though this may be doubted."

This judicial construction here admitted is conclusive So, when there was a specific consent given, admeasuing liability to suit both by precedent and subsequent obligations, of necessity, those that were extraterritorial were included, and the appointment of a local agent in Mississippi was sufficient to authorize an action there.

The appointment of Wilkinson as agent—a *bona fide* resident of Missisippi—was not a farce, yet, if respondent's contention is allowed, there was naught wherefor Wilkinson could be used; no process could be on him served, obviously a *non sequitur* from the mandatory requirement of his appointment, conditioning thereby that sought by repondent to be done.

This rule is rather general elsewhere.

Pennsylvania Fire Insurance Co. case, 267 Mo. 524, 184 S. W. 999; *State ex rel. Grimm*, 239 Mo. 135, 143 S. W. 432; *Johnson v. Trade Ins. Co.*, 132 Mass. 432; *Wilson v. Fire Alarm Co.*, 149 Mass. 24; *Reynolds v. M. K. & T. Ry. Co.*, 117 N. E. (Mass) 913, affirmed *per curiam*, 255 U. S. 565. Note the limitation, however, in *Davis v. Farmers Equity Co.*, 262 U. S. 312; *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432; *State ex rel. v. Gehrz*, 194 N. W. 418; *Rishmiller v. R. R. Co.*, 134 Minn. 262, 159 N. W. 272; *Mooney v. Buford*, 72 Fed. 32; *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148; *Farmers & Merchants Bank v. Fed. Res.*, 286 Fed. 2[illegible]

In the court below it was contended that many authorities were *contra*; the differentiation adverted to in the *Robert Mitchell Furniture Company case*, *supra*, runs through the gamut.

Consent to accept service is the predicate on which the service in this cause was made.

What could be more reasonable than to require defendant to keep its contract?

Note the condition of admission to do insurance business in Mississippi whereunder the deposit is for:

> "exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States."

Thereunder when this defendant qualified in Mississippi it contracted for the benefit of "all of the company's policyholders and creditors in the United States, * * *" That this deposit should be an "exclusive trust" for them—that is, "all the company's policyholders and creditors in the United States."

By *Lee* v. *Newman*, 55 Miss., 365, and *Washington* v. *Soria*, 73 Miss. 665, a direct cause of action was created in favor of plaintiff assertable in the courts of Mississippi in its own name therefor.

The ruling of the court below confused the implications drawn by law from doing business without qualification, and erroneously limited a *precise* contract by an *implication* in no wise applicable.

(b) Defendant estopped from claiming no business done by execution of contract agreeing to be sued.

As said in *Pennoyer* v. *Neff*, 95 U. S. 714, quoting to approve Court of Exchequer in *Vallet* v. *Dumergue*, 4 Exchequer, 290:

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them."

When defendant came to Mississippi to participate in the insurance business in Mississippi, it wrote this letter (March 16, 1923):

> "This company *being desirous of re-entering the State of Mississippi*, for the purpose of transacting a

> fire reinsurance business under treaty with direct writing companies *authorized to transact business in your state*, we shall be obliged to have certain information." (R., 139, *et seq.*)

And in the pursuance thereof, it executed its powers of attorney.

Again: The tax statement was returned pointing out that the direct writing companies paid the premium tax, and then the corporation shows that it did business to the extent of millions of dollars in virtue of these representations so thus made. (R., 165, *et seq.*)

Now having obtained its license to do business in virtue of these representations that it was so thus doing business, can it now, in full possession of the rights of such business, the exact nature of which it clearly understood, contend that it did not do business when all these precise declarations to the contrary were explicitly made, and in virtue of them alone, the right to reinsurance business was secured?

As was said in *Lowrey* v. *Hawaii*, 206 U. S. 222, 51 L. ed. 1033:

> "In *Brooklyn L. Inc. Co.* v. *Dutcher*, 95 U. S. 269, 24 L. ed. 410, it was said: 'There is no surer way to find out what parties meant than to see what they have done.'"

The defendant could not participate in reinsurance, and having represented that it was doing business, is now estopped to question that such business was so done. The law sitused everything in Mississippi expressly. It required resident agents and resident action and the mere fact that these actual agreements were perchance made in New York do not override the express statutes of Mississippi localizing here, and defendant, having agreed to obey the law, is estopped to say its acts do not conform thereto.

POINT II.

Defendant's acts a doing of business.

(a) Qualification Is Equivalent, as to an Insurance Company, to Domestication.

In *State Ex Rel.* v. *Grimm*, 239 Missouri, 135; 143 S. W. 432, that court said:

> "Within the contemplation of the statute relating to service of summons upon foreign insurance companies, *such companies are regarded as residing in each county in this state.* (*Meyer* v. *Ins. Co.*, 184 Mo. 486.)"

Cairney v. *United Surety Company*, 217 N. Y. (1916), 273, holds:

> "*We think that a foreign corporation thus licensed under our own laws may not with reason be held to be absent from our State.* It owes to the law of its creation its franchise to be a corporation, *but* it *owes to the law of this State the privilege of doing business within our borders.* In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions."

(b) Reinsurance Is Doing Business.

The qualification was general. Its election to segregate its business to a particular branch was voluntary.

Under these statutes *reinsurance* is doing business in Mississippi, Sections 5014, 5023, 5070, 5071, 5028, 5119, 5144, 5141, as the very instruments by defendant executed, declare. 5802 5803-5805-5806-5818 5915-5940

State Ex Rel European Accident Insurance Co. v. *Tomlinson*, 129 N. E., 684 (Ohio, 1920), is conclusive.

This decision goes to the full extent of holding that reinsurance made in New York was subject in all things to the power of the Insurance Commissioner of the State of

Ohio; and the State of Ohio might condition the right to do this reinsurance business as it saw fit and the manner wherein this reinsurance was being done, was a matter whereover the defendant was liable to the jurisdiction of the State and was doing business in Ohio.

The insurance business, as a business, is one whereover plenary power is vested in the State.

POINT III.

When defendant's qualification in Mississippi was for a complete transaction of business, its voluntary election to do only a certain portion does not confer immunity from suit.

Defendant, upon qualification, became conversant with the statutes and decisions of Mississippi applicable, and as said in *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 659, 67 L. ed. 1164:

> "And as the statute is prospective in its operation (*Denny* v. *Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep., 134; *Abilene Nat. Bank* v. *Dolley*, 228 U. S. 1, 5, 57 L. ed. 707, 709, 33 Sup. Ct. Rep. 469), there is no constitutional obstacle to a state's providing that, in the absence of dissent, consent shall be presumed. Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge. See *Ogden* v. *Saunders*, 1 Wheat 213, 231, 6 L. ed. 606, 611; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550, 18 L. ed. 403, 408."

This provision of law made for the insurance companies coming into Mississippi constituted an element of contract. It is well to remember the declarations of *Security Mutual Life Insurance Company* v. *Pruett*, 202 U. S. 246, 50 L. Ed. 1013, where the cases are collected dealing with the right

of a state to exclude a foreign corporation, and while it is true that in a certain aspect the holding has been overruled, yet the holding of the majority opinion remains unimpaired and the state may condition a foreign corporation doing business in such manner as it may think wise; provided, only, it does not exact the foregoing of the right guaranteed by the Federal Constitution. *Insurance Company* v. *Hyde*, U. S. Adv. Op. 163; Feb. 1, 1928, *supra; Tyson* v. *Banton*, 274 U. S. 418, 71 L. Ed. 18, *supra; Insurance Company* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, *supra*.

Mississippi did not segregate the business of reinsurance into a separate, distinct category which might be exercised without the qualification to do a direct writing business. Therefore, qualification exacted by the statutes, *supra*, constituted an absolute license to the defendant to preempt and occupy the entire insurance field, direct writing, reinsurance writing, and what-not. The defendant knew that such a consent was requisite and, so knowing, consented; but now having consented, contends that it may not be subordinated and sued, for the reason that though it be licensed to do the full insurance business, contrary to permission of the statute, it will segregate and select that which is profitable and leave undone that which is unprofitable, and by its selection, its segregation, nullify the prime condition of its qualification, which was subordination to Mississippi's sovereignty as an entirety.

No power is vouchsafed defendant to divide the state's sovereignty, and by such severance subject the sovereignty to the caprice of an alien subject.

State v. *Alley*, 51 So. 467, 96 Miss. 720.

Fikes v. *State*, 87 Miss. 251, 39 So. 783, supra.

Thus, construing the statute this course of conduct upon the part of defendant is intolerable; its subordination, under its qualification, must be admeasured by the provisions of

the law, and not by the caprice of defendant in its selection of that which it feign would have from other business it did not desire. This power under Mississippi statutes, is not vouchsafed. Qualification means subordination, with responsibility, expressly given in virtue of the deposit made unto all policyholders and *all creditors* in the United States, whereof plaintiff was one, in a transitory cause of action.

POINT IV.

Defendant Entered Voluntary Appearance by:

a. Plaintiff sued defendant in Mississippi, where neither resided; by removal defendant waived objection to personal jurisdiction;

b. Filing plea and motion, Section 523 Mississippi, Hemingway's Code, 1917, being inoperative because statute not operative in jurisdictional matters.

(a) Plaintiff Sued Defendant in Mississippi, Where Neither Resided, and by Removal Defendant Waived Objection To Personal Jurisdiction.

Plaintiff, a non-resident of Mississippi, voluntarily sued defendant, likewise a non-resident of Mississippi, in the circuit court of Harrison County, whereupon defendant removed to the District Court of Mississippi when neither party resided in Mississippi.

Ex parte Wisner, 203 U. S. 449, 51 L. ed., 264, sets forth the applicable statutes as follows:

> "The 1st section of the Act of March 3, 1887, (24 Stat. at L. 522, Chap. 373), as corrected by the Act of August 13, 1888 (25 Stat. at L. 433, Chap. 866) amended Sections 1 and 2 and 3 of the Act of Congress of March 3, 1875 (18 Stat. at L. 470, Chap. 137, U. S. Comp. Stat. 1901, p. 508), as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; * * * *But no person shall be arrested in one district for trial in another in any civil action before a circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;* but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought *only in the district of the residence of either the plaintiff or the defendant.* * * *

Sec. 2. That any suit of a civil nature * * * of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, * * * may be removed by the defendant or defendants therein to the Circuit Court of the United States *for the proper district.* Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or *defendants therein being non-residents of the state.*"

At page 459, the court said:

"In short, the Acts of 1887, 1888 restored the rule of 1789, as we stated in *Cochran* v. *Montgomery* County, *supra.*

In the present case *neither of the parties was a citizen of the state of Missouri,* in which state the suit was brought, and, therefore, *it could not have been brought in the Circuit Court in the first instance.*

"Wisner did not, of choice select the state court as a forum, since *he could not have sued in the Circuit* Court under the act, *because neither he nor Beardsley was a citizen of Missouri.* And the question of jurisdiction *relates to the time of commencing the suit.*

"But it is contended that Beardsley was entitled to remove the case to the Circuit Court, **and as by his petition for removal, he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. * * * 'A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal Courts.** When then Beardsley filed his petition for removal *he sought affirmative relief in another district than his own.* But plaintiff, in resisting the application, and moving to remand, denied the jurisdiction of the Circuit Court. In *St. Louis & S. F. R. R. Co.* v. *McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Rep. 982, where the plaintiffs were citizens and residents of the western district of Arkansas, and commenced their action in the Circuit Court of the United States for the district, and the defendant was a corporation and citizen of the State of Missouri, it was held that, as the defendant appeared and pleaded to the merits he thereby waived his rights to challenge thereafter the jurisdiction of the court over him, on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect.

"Our conclusion is that the case should have been remanded; and as the Circuit Court had no jurisdiction to proceed, that mandamus was the proper remedy."

It will be specifically noted that in that case the chief justice, among other things, held "*When, then, Beardsley filed his petition for removal, he sought affirmative relief in another district than his own.*"

That declaration of the *Wisner* case has not been overruled.

Shortly after came *Ex Parte Moore*, 209 U. S. 470, 52 L. Ed. 907.

There Mr. Justice Brewer, who had concurred in the conclusion in the *Wisner* case, delivered the opinion. There, an infant, by his next friend, brought an action in

the state court of Missouri against the L. & N. R. R. Co., a Kentucky corporation, for personal injuries. The railroad company filed a petition to remove, based upon diverse citizenship.

The plaintiff filed in the District Court, after removal an amended petition; defendant was given time to plead.

At the September Term, 1907, a motion was made to remand and overruled. Thereupon an application for mandamus was presented to the Supreme Court, Mr. Justice Brewer said:

> "This brings up two questions: First, *whether both parties did consent to accept the jurisdiction of the United States Court*; and, second, if they did *what effect such consent has upon the jurisdiction of the United States Court.*
>
> "*That he defendant consented to accept the jurisdiction of the United States Court is obvious. No clearer expression of its acceptance of the jurisdiction of the latter court could be had.*"

In the case at bar, neither the plaintiff nor the defendant were resident in Mississippi, and the defendant, a *non-resident of Mississippi*, voluntarily removed, and voluntarily gave bond to *appear*, even; in addition, filed the motions and pleas. The defendant could not have been sued in the District Court by the plaintiff, had defendant taken suitable objection.

This disability is personal—modal—*United States v. Heasleb*, 237 U. S. 12, 59 L. Ed. 818, and may be waived by the defendant.

Then, the *Moore* case, *supra*, says (page 911):

> "The contention is that, *as this action could not have been originally brought in the Circuit Court of the Eastern District of Missouri*, by reason of the last provisions quoted from Section 1, *it cannot*, under Section 2, *be removed to that court*, as the authorized removal is only of those cases of which, by the prior section, original jurisdiction is given to the United States

Circuit Courts. *But this ignores the distinction between the general description of the jurisdiction of the United States Courts and the clause naming the particular district in which an action must be brought.*

It may be well to examine the authorities touching this matter. In *Gracie* v. *Palmer*, 8 Wheat. 699, 5 L. L. Ed. 719, the court, by Mr. Chief Justice Marshall, held that:

'The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, *was the privilege of the defendant*, which he might **waive by a voluntary appearance**.'

* * * * *

In *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 219, 40 L. Ed. 401, 402, 16 Sup. Ct. Rep. 272, 273, Mr. Justice Gray thus stated the law:

"That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a State Court; and, if any objection arises to the particular court which does not run to the Circuit Courts as a class, *that objection may be waived by the party entitled to make it*. **As we have seen in this case, the defendant applied for a removal of the case to the Federal Court**. *Thereby he is foreclosed from objection to its jurisdiction.*"

Note the defendant applied for a removal of the cause to the Federal Court. Thereby he was foreclosed from objecting to its jurisdiction of the person.

This is a direct decision as to the effect of removal. So far as we can ascertain, this decision remains the law, though touched upon, it is true, in *General Investment Co.* v. *R. R. Co.*, 260 U. S. 261, 67 L. Ed. 244, it was not decided, *contra*, as we understand that case.

In Rose's Federal Jurisdiction and Procedure (3d Ed.) 363, it is said:

"It speedily became apparent that much said in that case (*ex parte Wisner*) went beyond what the majority of the court upon fuller reflection were willing to approve. Subsequent decisions limited its application and shook its authority, and in January, 1923, in *Lee*

v. *Chesapeake & Ohio Railway Company* it was expressly overruled. It was then declared that Section 28 is not restricted by the venue provisions of Section 51. *The latter merely extends to defendants a privilege which they may waive and their application to remove is a waiver.*"

See *Id.* 337.

To like effect: *Vaughn* v. *McArthur Bros Co.*, (C. C. A., 8th Cir.) 227 Fed. 367.

Coalmont, etc., Coal Co. v. *Matthews & Addy Steamship Corp.*, 271 Fed. 115.

While it is true that the Supreme Court reversed the decision of the Circuit Court of Appeals in *Wabash Western Railway Co.* v. *Brow*, 65 Fed. 945, it seems to us, with deference, to have been correctly decided. Two members of that court subsequently sat on the Supreme bench and the present chief justice delivered the opinion below in the *Brow* case. There he cited *Pollard* v. *Dwight*, 4 Cranch. 421, where Dwight brought a foreign attachment against Pollard in a state court. The defendants removed the cause to the United States Court and there pleaded to the jurisdiction.

"In *Sayles* v. *Insurance Co.*, 2 Curt. 212 Fed. Cas. No. 12, 421, a foreign corporation sued in a state court of Rhode Island filed a petition in that court to remove the suit to the Circuit Court of the United States for that district. The defendant then moved to dismiss the action for want of jurisdiction, on the ground that the only service made in the state court had been an attachment of the goods and effects of the defendant, *because it was neither an inhabitant of the district where the suit was brought, nor was it found therein;* but Mr. Justice Curtis held that under the twelfth section of the Judiciary Act it was not necessary that the defendant should be an inhabitant of the district, or should be personally found therein; *that under that act any process in accordance with the laws of the state, by which the defendant was made a party was sufficient to constitute it a pending suit for removal*

within the jurisdiction of the Federal Court. As a second ground, however, for his conclusion he said:

'Besides, it has been held in *Toland* v. *Sprague*, 12 Pet. 300, that the locality of the action within the district where the defendant is an inhabitant or is found, is a personal privilege of the defendant, which he may waive by appearing and pleading to the action. And I am of opinion that when he appears in a state court, files a petition for leave to remove the action, gives a bond to enter it in the Circuit Court, and actually enters it there, *he has waived any personal privilege he might have had to be sued in another district.* If pleading to the action amounts to a waiver of such privilege, upon the ground that he ought not afterwards to be heard to object to the means by which he was brought into court, I do not perceive why these proceedings should not have the same effect. *The defendant comes in, becomes the actor, treats the suit as one properly instituted, removes it to another court and enters it there,* and then says he is not obliged to appear at all, and the state court in effect had no suit before it. This, I am of the opinion, he cannot do. I consider that this court will not look back to inquire into or try the question whether the state had jurisdiction. The act of congress allows defendant to remove actual and legally pending suits from the state courts. If this were not such a suit, the defendant should not have brought it here. By bringing it here, he voluntarily treats it as properly commenced, and actually pending in the state court; and he cannot, after it has been entered here, treat it otherwise. It is urged that this will prevent citizens of other states from trying in this court the question whether the state court had jurisdiction. Not so. If the state court had no jurisdiction, and the defendant does not appear, its proceedings are all void, and may be shown to be so in an action brought in this court against any one who meddles with the person or property of the defendant under the color of such proceedings. The only objections which the defendant will be precluded from trying here are technical objections which do not affect the merits; and I see no good reason why he should not be prevented from trying them here.'

These remarks have been referred to as *obiter dicta*, and unnecessary to the decision of the case. This

is hardly a proper statement of their effect. Mr. Justice Curtis puts his decision on two grounds, either of which sustains his conclusion, and the statement of neither, therefore, is *obiter dictum*. * * *

'But we cannot recognize the validity of the inference that the defendant, before pleading in the Circuit Court, *may move to dismiss the suit for want of jurisdiction. This construction would enable the non-resident defendant in a state court to remove the suit against him into a circuit court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction unless imperatively required by the plain language of the act* does not require it. Its plain meaning is that the suit shall proceed, *not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against consent, but by his own act;* and the suit is *to proceed as if brought by original process*, and the defendant had waived all exception to jurisdiction, and pleaded to the merits.'"

Think of the result, if a corporation, in virtue of the venue statute, similar to the Chesapeake & Ohio Railroad, could remove all controversies to the District Court, and then promptly dismiss them, in virtue of the jurisdiction voluntarily invoked, on the ground that said suit could not be prosecuted in a district other than that wherein plaintiff or defendant was a resident.

In the *Lee case, supra*, the plaintiff moved that the suit be remanded on the ground that there was no jurisdiction, in that neither party was a resident of the district. The motion was overruled. The plaintiff elected to stand on the motion and judgment was given for the defendant, whereupon the case was brought to the Supreme Court direct on the former practice as to jurisdiction. There was again a review of the constitutional provisions vesting jurisdiction, and it was pointed out that the District Court had jurisdiction:

"of all suits of a civil nature at common law * * *
where the matter in controversy exceeds * * *

three thousand dollars and * * * is between citizens of different states."

Mr. Justice Van Devanter pointed out that this was a grant of jurisdiction; then he dealt with Section 51, which provided:

> "No civil suit shall be brought in any district court *against any person* by any original process * * * in any other district than that whereof he is an inhabitant but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. *There was no jurisdiction over the person of the defendant in the district*, but knowing this full well, defendant elected to invoke the jurisdiction of this District Court, otherwise not obtainable except by its consent. Removal to this District Court gave this consent, and was a complete waiver of any further right to deny jurisdiction over the *person* of defendant—by removal, all such was ended."

(b) Filing pleas and motions, Section 523, Hem. Code, 1917, being inoperative because statute not operative in jurisdictional matters:

1. Defendant entered a general appearance by its pleas and motions. At common law, there were three kinds of pleas: (1) plea to the jurisdiction; (2) plea in abatement, and (3) plea in bar. A defendant wishing to file any of these pleas must file in the order named and by the filing of a plea out of order, the defendant was conclusively presumed to have waived all preceding pleas, that is, if it filed a plea in bar it waived every defect as to the jurisdiction and all matters of abatement. If it filed a plea in abatement, this acted as a voluntary and general appearance and waived any question as to the court's jurisdiction over the defendant. Perry on Common Law Pleadings, p. 420.

All of the cases lay down the rule that a plea in abatement in terms limited to a special appearance, waives

every question of the court's jurisdiction over the person, and operates as a general appearance giving the court jurisdiction over the person of such pleading defendant. *Elliot* v. *Lachead*, 1 N. E. 577; *Summit Lumber Co.* v. *Cornell Yale Co.*, 123 N. W. 444; *Perrine* v. *Knight Templars & Masons' Life Indemnity Co.*, 101 N. W. 1017. 2 *R. C. L.* Page 330, Section 9.

Defendant first moved to quash; simultaneously, filed double barrelled "pleas and motions"—reiterating the motion to quash, and coupling with it, what might have been thought to be a plea of *lis pendens*, but which in fact, with deference, was not so, but an entry of appearance with a prayer for stay. It set up, specifically,

> "*Wherefore, it prays judgment of the said writ and declaration and that the same may be quashed; or, if the court should be of opinion that the proper relief is not the quashing of the writ but a suspension of the proceeding, then and in that event that this Honorable Court will make and enter and order that this suit do stay and be suspended and respited until the said action so pending in the Southern District of New York should have been determined.*" (R., 38.)

Now these "pleas and motions" are irrevocably joined; there is therein but one prayer for judgment. The caption sets forth that the defendant "appears specially for the purpose of filing the *pleas and motions* hereinafter set out and for no other purposes." (R., 37.)

By this, defendant was in court just as effectually under the second subdivision as it was under the first, namely, irrevocably joining together a motion and plea of want of personal jurisdiction, and a motion and plea predicated upon the respite prayed until a definite and fixed time. The court held without serious controversy that by thus doing, as well as by conduct thereunder had, the defendant would have been in court, save and except he was saved by Section 523, Hem. Code of Mississippi, 1917, which provides:

"Several pleas in abatement. The defendant may *plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ or declaration;* and he shall set forth the matters *in separate pleas,* and in *plain, intelligible, concise language,* without regard to technical form; and *where the matter pleaded does not appear on record,* he shall *verify such plea by the oath or* affirmation of *himself or some other credible person.*"

This Section 523 is not here controlling, because,

Federal jurisdiction is not controlled or affected by the conformity statute.

Mankin v. *Bartley* (C. C. A.), 255 Fed. 466, is directly in point. Under the statute of Virginia the defendant might, in a state court, plead both in abatement and in bar, and the defendant so did in the Federal Court, and sought to challenge the jurisdiction of his person precisely as was here done; the declaration of the Court of Appeals was: that Federal jurisdiction was not altered in the state statute.

In *Munter* v. *Weil Faucette Co.*, 261 U. S. 276, 67 L. ed. 652, the court said:

"We have decided in cases which concern the jurisdiction of the Federal Courts that, notwithstanding the Conformity Act, neither the statutes of the States nor the decisions of its courts are conclusive upon the Federal Courts, the determination of such questions being 'in these courts alone.' *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 443, 54 L. ed. 272, 276, 30 Sup. Ct. Rep., 125. The motion of Munter, therefore, should have been granted, and the action dismissed." *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 438, 54 L. ed. 274.

In *Western Loan & Savings Co.* v. *Butte & Boston Consolidated Mining Co.*, 210 U. S. 368, 52 L. ed. 1101, an action was brought in the Circuit Court in Montana by a citizen of New York which was dismissed for want of jurisdiction,

and whether that decision was correct is the single question carried direct to the Federal Supreme Court by writ of error; where the conformity statute was invoked, providing that:

> "The practice, pleadings, forms and modes of proceedings in civil causes * * * shall conform, as near as may be, to that in like causes in courts of the State wherein the proceedings are held."

But Mr. Justice Day said:

> "* * * nevertheless, in cases like the one under consideration, involving the jurisdiction of the Federal Courts, the ultimate determination of such questions is for *this court alone*."

There the Supreme Court reviewed the decision of *Mexican Cent. R. Co.* v. *Pinkney*, 149 U. S. 194, 37 L. ed. 699, wherein the Texas statute as to special appearance, precisely similar to our Mississippi statute, was held to be inoperative.

In the *Western Loan Co. Case*, the defendant, as permitted, by a local statute of Montana, filed a demurrer to the complaint, alleging:

> "1st, that the court has no jurisdictions of the subject of the action; 2d, that the court has no jurisdiction of the person of the defendant; 3d, that said complaint does not state facts sufficient to constitute a cause of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible."

The district judge overruled this demurrer as to the first, second and third grounds, but sustained it on the 4th and 5th grounds, viz., that it was uncertain and unintelligible. Plaintiff then amended, and the defendant repeated the same grounds of demurrer, viz., those covering jurisdiction over the subject-matter of the action and jurisdiction over the person of the defendant. Thereupon, Judge Hunt, says Mr. Justice Day:

"* * * in a well-considered opinion, held that, inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the case being one within the general jurisdiction of the court, although instituted in the wrong district, the defendant had waived its personal privilege not to be sued in the Montana district, and had submitted to the jurisdiction. In support of his view Judge Hunt cited *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Re Keasley & M. Co.*, 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Central Trust Company* v. *McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Lowery* v. *Tile Mantel & Grate Asso.*, 98 Fed. 817; *Texas & P. R. Co* v. *Saunders*, 151 U. S. 105, 38 L. ed. 90, 14 Sup. Ct. Rep. 257. Thereafter, before any further steps were taken in the case the learned judge changed his ruling on the question of jurisdiction, and filed the following brief memorandum opinion:

'As neither party to this action was, at the time of the institution thereof, a citizen or resident of the State of Montana, upon authority of *Ex parte Wisner*, decided by the Supreme Court, December 10, 1906, and followed by the Court of Appeals of this circuit in *Yellow Aster Min. & Mill Co.* v. *Crane Co.*, 80 C. C. A. 566, 150 Fed. 580, and *Southern P. Co.* v. *Nurch, decided February* 11, 1907, 82 C. C. A. 34, 152 Fed. 168, I must reverse the ruling heretofore made by me upon the demurrer, and dismiss the case for lack of jurisdiction.'

'So ordered.'

Let us see, then, whether the defendant had submitted to the jurisdiction of the Circuit Court. It had appeared and filed its demurrer to the original complaint, invoking the judgment of the court, as hereinbefore stated, and the court had ruled against it on the question of jurisdiction, and upon the merits of the cause of action, only sustaining the demurrer as to the form of the allegations in the complaint. It invoked and obtained a ruling on the merits, so far as the legal sufficiency of the cause of action is concerned.

Then the amended complaint was filed. The court sustained its jurisdiction upon hearing the demurrer, which ruling is subsequently changed on the authority of *Ex parte Wisner*, which is now overruled *in Re Moore*, in so far as it was said in the Wisner case that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed.

So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under which sections similar to Section 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States Circuit Court, as is shown by the case of *Shaw* v. *Quincy Min. Co. (Ex parte Shaw)*, 145 U. S. 444, 36 L. Ed. 768, 12 Sup. Ct. Rep. 935,—a suit in a district in the State of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of states other than New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in *Re Keasbey & M. Co., supra*.

In *St. Louis & S. F. R. Co.* v. *McBride*, *supra*, the case, like the present one, arose in a code state. Suit was brought in the Circuit Court of the United States for the western district of Arkansas. The Arkansas Code, in respect to grounds of demurrer, is identical with the Montana Code. *Kirby's Digest* of the Statutes of Arkansas, 1904, p. 1285. Following the Arkansas Code, as the defendant in this case follows the Montana Code, the defendant filed a demurrer in language identical upon these points with the demurrer in this case. The demurrer reads: '1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court had no jurisdiction of the subject-matter of the action. 3d. Because the

complaint does not state facts sufficient to constitute a cause of action.'

Of the effect of this demurrer Mr. Justice Brewer, delivering the opinion of the court, said:

'Its demurrer, as appears, was based on three grounds: Two referring to the *question of jurisdiction*, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but *all special privileges* of the defendant in respect *to the particular court* in which the action is brought.'

This case presents the same question. We are of opinion that the defendant had waived objection to jurisdiction over its person, and, by filing the demurrer on the grounds stated, submitted to the jurisdiction of the Circuit Court.

Judgment reversed."

There, under the Montana statute, this was proper pleading, but the Supreme Court pointed out that it should have entered its appearance specially and moved to quash the service, but that by joining in its demurrer several grounds, one as to the jurisdiction and another as to the merits it thereby did forego the objection to the jurisdiction and preclude itself from relying thereon. How much stronger is the case at bar?

In *Big Vein Coal Co.* v. *Read*, 229 U. S. 38, 57 L. Ed. 1056, Mr. Justice Day again declared:

"It is true that where the defendant appears by motion and objects to the jurisdiction, and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, 35 L. Ed. 659, 11 Sup. Ct. Rep. 982, where a demurrer was interposed raising two grounds of jurisdiction, and the third going to the merits of the cause of action, and it was held that there had been a submission to the jurisdiction of the court. See, also,

Western Loan & Sav. Co. v. *Butte & B. Consol. Min. Co.*, 210 U. S. 368, 52 L. Ed. 1101, 28 Sup Ct. Rep. 720."

St. Louis & S. F. R. Co. v. *McBride*, 141 U. S. 127, 35 L. Ed. 659, was an action to recover money between citizens of different states brought in the district and state of the residence of the plaintiff, the sum claimed being in excess of the jurisdictional amount. Thereupon the defendant—the record showing no process—interposed a demurrer on three grounds; "1st, because the court had no jurisdiction of the person of the defendant; 2d, because the court had no jurisdiction of the subject-matter of the action; 3d, because the complaint does not state facts sufficient to constitute a cause of action." The demurrer was overruled; plaintiff recovered, and the case went to the Supreme Court on the question of jurisdiction alone, as the judgment did not exceed five thousand dollars, and whether plaintiffs were entitled to recover was not a matter of jurisdiction, and said the court:

> "Assuming that service of process was made although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but *all special privileges of the defendant in respect to the particular court in which the action is brought.*"

Here we have a motion to quash, which was a perfectly proper pleading (except for the fact that this court's jurisdiction had been invoked by the defendant) and then pleas and motions irrevocably joined together, concluding with a prayer not a proper pleading in any common law state;

but the thing is entire. The absolute appearance thereby, even though the plea in abatement was a *lis pendens*, a plea in abatement, make it impossible for the defendant to question the jurisdiction.

In *Jones* v. *Andrews*, 10 Wall. 327, 19 L. Ed. 935, the defendant, a necessary party, sued in a district other than that of his residence, moved a dismissal on two grounds; 1st, jurisdiction; 2d, no equity, and Mr. Justice Bradley said:

> "* * * whether, if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver, and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

There is nothing in *So. Pac. Co.* v. *Denton*, 36 L. ed. 942, contrary, because as said:

> "*The jurisdiction of the Circuit Court of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a State.* *Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 328 (9: 1093, 1104); *Coules* v. *Mercer County*, 74 U. S. 7 Wall. 118 (19: 86); *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 286 (20: 571, 577); *Phelps* v. *Oaks*, 117 U. S. 236, 239 (29: 888, 889). *And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter.* *Ex parte Fisk*, 113 U. S. 713, 721 (28: 1117, 1120); *Whitford* v. *Clark County*, 119 U. S. 522 (30: 500). To conform to such statutes of a State would 'unwisely incumber the administration of the law,' as well as 'tend to defeat the ends of justice,' in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the State of Texas, have no application to actions in the courts of the United States."

The question of waiver of jurisdiction of the plaintiff is a question of Federal jurisdiction, and where it is a question of Federal jurisdiction, then that eliminates, for all time, State statutes.

In *Chatters* v. *Louisville & N. R. Co.*, 17 Fed. (2d Ed.) 306, Judge Burns said:

> "(2) The doing of a general freight and passenger business in Louisiana through other agents or agencies is otherwise alleged, and is admitted by the Southern Railway Company. The question directly presented is whether or not the jurisdiction of the United States District Court may depend upon state laws or judicial construction by state courts, and must be answered in the negative.
>
> "R. S. Sec. 721 (Comp. St. Sec. 1538), which provides that the law of the several states shall be regarder as rules of decision in trials at common law in the courts of the United States, in cases where they apply, except where the constitution, treaties, or statutes of the United States otherwise require or provide, prohibits the possibility of state legislation or judicial decision defeating the express statutory mandates of Congress. R. S. Sec. 914 (Comp. St. Sec. 1537), *the Conformity Act which provides that the practice, pleading, and forms and modes of proceeding in civil causes shall conform as nearly as possible to those of the courts of record in the state*, is beside the point. See, *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S. 194, 206, 207, 13 S. Ct. 859, 37 L. ed. 699.
>
> "(3) The exceptor's attack is leveled at the venue rather than the jurisdiction. *But the fact that this venue is established by Congress brings it under the prohibitive exception in R. S. Sec. 721, above referred to, so that the venue as well as the jurisdiction is cloaked with the authority of a statute of the United States, and therefore no state statute or judicial construction may be regarded here as a rule of decision.* The venue is established by Section 51 of the Judicial Code (Comp. St. Sec. 1033), which provides that, where jurisdiction is founded only on diversity of citizenship, the plaintiff may bring his suit at the place of his residence, or at that of the defendant, whilst the cause of action stated is within the general jurisdiction of this court as conferred by Section 24 of the

Code (Comp. St. Sec. 991). See *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 277, 43 S. Ct. 347, 67 L. Ed. 652; *Mechanical Ap. Co.* v. *Castleman*, 215 U. S. 437, 443, 30 St. Ct. 125, 54 L. Ed. 272." (Italics ours.)

In *Hassler* v. *Shaw*, 271 U. S. 195, 70 L. ed. 900, the question is treated purely as one of jurisdiction.

Note, also, *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, 58 L. ed. 534, holding that in matters of jurisdiction the Federal rule was conclusive.

In *Frackman* v. *Lloyds*, 7 Fed. (2d Ed.) 620, it is said:

"This court is of the opinion that what amounts to a general appearance is to be determined by the Federal court independently of state statutes and decisions; that the Conformity Act was not intended to govern such questions; that all questions involving the jurisdiction of the Federal courts are to be determined by them without regard to state statutes and decisions. In *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652, where the question of validity of the service was involved, the court said: We have decided in cases which concern the jurisdiction of the Federal courts that, notwithstanding the Conformity Act, neither the statutes of the states nor the decisions of their courts are conclusive upon the Federal court: the determination of such questions being 'in this court alone.' See, also, *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 30 S. Ct. 125, 54 L. Ed. 272; *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, 34 S. Ct. 284, 58 L. Ed. 534; *Goldey* v. *Morning News*, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517; *Mexican Central Railroad Co.* v. *Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699. * * *"

In *De Lima* v. *Bidwell*, 182 U. S. 174, 45 L. Ed. 1047, there had been an action brought in the state court of New York, removed by the defendant, and the question of this removal to the Federal court was at issue, and the court there said:

"Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the Circuit Court *as a Federal court*, we should be obliged to say

> that the defendant was not in a position to make t
> claim, since the case was removed to the Federal co
> upon his own petition. It is no infringement upon t
> ancient maxim of the law that consent can not co
> fer jurisdiction, to hold that, where a party has pr
> cured the removal of a cause from a state court up
> the ground that he is lawfully entitled to a trial in
> Federal court, he is estopped to deny that such r
> moval was lawful if the Federal court could take jur
> diction of the case."

This underlying principle is fundamental. A state statu
may never interfere with the jurisdiction of the Feder
court. That is prescribed by the constitution and by Co
gress, and being prescribed by the constitution and by Co
gress, may neither be expanded nor contracted by sta
statutes. Federal jurisdiction is, therefore, not altered
the conformity statute. Were it alterable, then Mississip
statutes as an entirety must needs be considered, and the
would be no such thing as a special appearance. *Cain*
Commercial Publishing Co., 224 U. S. 124, 58 L. Ed. 52

So, if one of the idiosyncrasies of Mississippi's jurisd
tion on special appearances is accepted, the other must
taken at the same time. But so to do, the Supreme Cou
has expressly refused when a similar statute was broug
to its attention in Texas, just as it did when this preci
statute was brought to its attention in Mississippi. T
Supreme Court sits as sole arbiter of Federal jurisdictio

The rules of the common law as to jurisdiction over t
person were precise, logical; though the defendant mig
have pleaded these several pleas and motions at the sa
time, yet this permission did not confer upon the defenda
the further right to have a trial on the plea of *pendi*
suit while the plea of want of jurisdiction over the pe
son was still undetermined. •

In this cause (R., 65): "By Mr. Pillans, of counsel f
defendant": (before the hearing on the want of jurisd
tion over the person)

"*I am now in open court demanding of the plaintiff to know* if it be not a fact *that the action in the Southern* District Court of New York *brought by Morris & Company against* the Skandinavia Insurance Company, *and set up in the plea of lis pendens, has been,* since the *filing of that plea in this cause, dismissed out of the said court, and is now no longer a* pending litigation."

By Mr. Green:

"That is a fact"—

The defendant, without reservation as to personal jurisdiction, was in open court, and being in open court, in virtue of the court having jurisdiction of a pending cause, demanded the right to know of the plaintiff whether or not that cause in New York had been dismissed. The plea stated:

> "hence, and in that event, that this Honorable Court could make and enter an order that this suit *do stay and be suspended* and *respited* until the said action, so pending, as aforesaid * * * should have been determined."

It was incumbent upon the defendant to proceed, step by step, in the order fixed by the common law to adjudicate the rights prescribed. First, as to the jurisdiction of the court; next, as to the disability of the person of the plaintiff and next of the defendant; next, to the writ—first, for matter appearing on its face, and then for matter *de hors*.

By taking up *lis pendens* plea, without a determination of the prior plea of jurisdiction of the person, of necessity, the defendant, obviously, waived the modal objection, and was conclusively bound by the appearance.

In *McLean Lumber Co.* v. *United States*, 237 Fed., C. C. 46, it is said:

> "Furthermore, both the United States and the Commission, a voluntary defendant, have by their written motions, moved to dismiss the petition upon grounds based in part upon want of equity on its face, and going to the merits, without objection to the venue;

this latter objection having been subsequently made orally at the hearing in behalf of the United States to hear and determine a controversy, but merely to the local jurisdiction of this court, it is equal by analogy to the rule in cases where there is a general Federal jurisdiction by reason of diversity of citizenship, but want of local jurisdiction by reason of the residence of the parties (*Western Loan Co.* v. *Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101) that the making of such defense upon the merits is a waiver of defect, if any there be, in the venue or local jurisdiction." Certiorari denied. 254 U. S. 32, 41 Sup. Ct. 7; 65 L. Ed. —.

See also:

Bester v. *Inter-County Fair*, 135 Wis. 341.

State ex rel. Hopman v. *Superior Court* (Wash., 1915), 153 Pac. 317.

Clark v. *Bankers Accident Co.* (1914), 96 Neb. 385.

The suit in New York had been dismissed and the court was bound to order the cause to proceed.

See, also:

Fulton v. *Ramsey et al.* (1910), 67 W. Va. 321.

McKillip v. *Harvey* (1907), 80 Neb. 266.

State v. *Grimm* (Missouri, 1912), 143 S. W. 484.

As pointed out in *Merchants Heat & Light Co.* v. *Clow*, 204 U. S. 286, 51 L. Ed. 488, the original plaintiff was an Illinois corporation, the defendant an Indiana corporation, and the question was whether the service of process was good, or, if not, whether there had been a waiver. In that suit the defendant set up a counter claim after it had made full reservation of its right as to jurisdiction, by reason of being a foreign corporation, and, as there said:

"* * * But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it (setting up its counterclaim).

Benedict v. *Seiberling*, 17 Fed. (2d Series), 1927, 841, states:

"The general rule is that any action on the part of a defendant which recognizes the case as in court, except to object to the jurisdiction over his person, will constitute a general appearance, and that, *if such act follows an attempt at special appearance only, waiver occurs of the claim of lack of jurisdiction of the person.* * * * *One who assumes the right of a party admits the effectiveness of the act which gives him that status. He thereby recognizes that an action is pending which involves him and in which he can have the relief asked only by appearing as a party thereto.*"

There is nothing in *Davis* v. *O'Hara*, 266 U. S. 314, 69 L. Ed. 303, *contra*, because in that case the action was brought in the District Court of Douglas County, Nebraska, and the Supreme Court was but following and administering the Nebraska law. On the contrary, it is expressly said:

"* * * This court is not bound by the decision of the state court that defendant waived his Federal right under the act and the order of the Director General, and it may determine for itself whether he sufficiently asserted and insisted upon that right."

As said in *Hammond* v. *District Court*, 39 A. L. R. 1497:

"In an unbroken line of decisions this court has said generally that any action on the part of defendant, except to object to the jurisdiction over his person, which recognizes the case in court, amounts to a general appearance, and gives the court the same jurisdiction as though process had been regularly served in the manner and form, and for the length of time, prescribed by law. (Cases.) * * *

"In the expression 'which recognizes the case as in court,' as used in some if not all of these several cases, means that it recognizes the case as pending in court, with jurisdiction of the subject-matter and of the parties. In order to do this, the defendant must seek some affirmative relief at the hands of the court, or he must ask a favorable decision upon some matter of a substantive character, or endeavor to secure a continuance or postponement. The reason underlying the doctrine is that no such action can be taken without the court possesses jurisdiction over his person, and he is

> not entitled to any such affirmative relief or favorable ruling unless the court possesses jurisdiction over his person, and when he seeks such relief, he necessarily assumes the attitude that such jurisdiction has been acquired, and having taken that position, he is bound thereby, and will not be heard afterwards to say otherwise."

Thus, having invoked the adjudication of the court of this plea, and specifically had it acted on before the question of personal jurisdiction was determined, of necessity, the invocation was a waiver of the highly technical plea sought to be interposed (of want of personal jurisdiction in the court) when "in open court" a demand was made of the court to so adjudge.

This plea or motion only sought that there be "a suspension of this proceeding." "This Honorable Court will make and enter and order that this suit do stay and be suspended and respited until the said action so pending as aforesaid * * * should have been determined." By proceeding "in open court" had at defendant's instance, this New York suit was shown to have been suspended, and not only suspended but suspended in virtue of an election made due to the interposition of this specific objection. So, that the specific objection here interposed would become and be without force.

This occurred, under an invocation of jurisdiction by defendant before determination of the motion to quash. The court had to enter an order on this application, which, by defendant's pleading, could have only been that the suit *do forthwith proceed*, because the time for the suspension had expired. The defendant was bound by its pleading; the court was bound to enter an order on this, and such an entry of such an order, under the invocation could only have been that the court proceed because the suit in New York no longer opposed an obstacle to the determination here. The court could not disregard and treat as moot this entry of appearance. Under its terms this action could

no longer be *suspended, stayed and respited.* That condition having happened, then the obvious duty of the court imperatively demanded that the court proceed under this motion, because the defendant had only asked that the suit be *stayed, suspended and respited* until this should occur, and having occurred, all asked would have been obtained.

The defendant expressly invoked the jurisdiction of the District Court, as a court, for the exercise of its judicial power in this pending suit whereover the court had jurisdiction to do a definite act—not to throw the suit out as improperly brought, whereof the court could have no jurisdiction—far from it—(the request admits competency of the court as a court at the instance of the defendant as a party litigant in a pending suit to grant the relief sought), but sought solely relief from being twice vexed. The order, when plaintiff had dismissed the New York suit, must have been—

> "This cause having been considered by the court, and the defendant having herein appeared and moved that in this cause this suit be stayed, suspended and respited until the determination of the New York suit, and it appearing, in virtue of this plea so thus interposed, that the plaintiff has dismissed said New York suit,
>
> "Now, therefore, it is hereby ordered and adjudged that having so appeared and invoked the jurisdiction of this court and said New York suit being now dismissed, that this suit do forthwith proceed to a hearing thereof on the merits."

The statutes in Virginia, permitting the same practice, specifically prescribe that the pleas must be determined in the order in which they should have been interposed under the common law.

In Mississippi the law is the same, because this innovation upon the rules of the common law did not alter it further than in the matter of the interposition of the pleas (*Edwards* v. *Gaulding*, 38 Miss. 118; *Hollman* v. *Bennett*, 44 Miss 322), and did not allow the litigant to litigate the pleas in an order other than that which had been deter-

mined by the common law. The requirement of the *separate* interposition connoted a preservation of the *precedent practice*, and required that one who therefrom varied should waive as at common law.

Thus, under the procedure had this must be considered a waiver of the modal objection that no jurisdiction obtained over the person.

Wherefore, the writ should issue and the record be certified for consideration by this court, because,

(a) Defendant contracted to be sued in Mississippi on both local and foreign causes of action, accruing both before and after qualification.

(b) Because defendant, by qualification in Mississippi became a domestic corporation.

(c) Defendant, by doing a re-insurance business, otherwise not permissible, except by qualification, did business and became subject to suit.

(d) Defendant, a non-resident, when sued by plaintiff, a non-resident, in the State of Mississippi, voluntarily entered an appearance by removing to the local Federal District Court.

(f) Defendant appeared by entering a plea of *lis pendens*, and Section 523, Mississippi Code, not operative to divest Federal jurisdiction.

Respectfully,

By JOHN M. LEE,
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GARNER WYNN GREEN,
CHALMERS POTTER,
SIDNEY MIZE,
Attorneys for Petitioner.

We file the Brief used in the Court of Appeals wherein statutes are quoted, decisions excerpted and discussed at greater length than here allowed.